(1)

Supreme Court, U.S.
FILED
JUN 24 1993
OFFICE OF THE CLERK

92-2062

No. _____

In The

Supreme Court of the United States

October Term, 1992

F.P. CORPORATION,

Petitioner,

v.

TWIN MODAL, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDICES

PAUL O. TAYLOR
Counsel of Record
HARRIS AND TAYLOR
2950 Metro Drive
Suite 301
Minneapolis, MN 55425
(612) 854-3996
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

In light of this court's holding in *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984), does 49 U.S.C. sec. 10762, or any other section of the Interstate Commerce Act, provide the Interstate Commerce Commission with a specific statutory mandate to declare a common carrier's filed distance rate tariff retroactively void solely because the carrier failed to comply with ICC regulations for the determination of distances?

LIST OF PARTIES

Petitioner F.P. Corporation (hereinafter "F.P.") is a corporation previously engaged in common carrier transportation of freight in interstate commerce. Respondent Twin Modal, Inc. (hereinafter "Twin Modal") is a corporation engaged in the freight brokerage business.

TABLE OF CONTENTS

Page

Question Presented i

List of Parties ii

Table of Authorities iv

Opinions Below 1

Jurisdictional Basis 2

Statutes Involved 2

Statement of the Case 3

I. REASONS FOR GRANTING THE WRIT 4

A. The Opinion Below Is Inconsistent With This Court's Previous Opinions Interpreting The Tariff Rejection Provisions Of The Interstate Commerce Act 4

B. The Courts of Appeals Are Irreconcilably Split On What Constitutes An Effective Tariff 15

CONCLUSION 21

ADDENDUM 1a

TABLE OF AUTHORITIES

Page

CASES

Aberdeen and Rockfish R.R. Co. v. United States, 682 F.2d 1092 (5th Cir. 1982), *cert. granted, judgment vacated and remanded for findings in light of Interstate Commerce Commission v. American Trucking Association, Inc.*, 467 U.S. 1237 (1984).....14, 15

Acme Pet Products, Ltd. v. Akron, C. & Y.R. Co., 277 I.C.C. 641 (1950)..... 10

Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc., 989 F.2d 2811 (8th Cir. 1993)..... 6, 15, 16, 20

Berwind-White Coal Mining Co. v. Chicago & E.R. R.R., 235 U.S. 371 (1914)..... 13, 14, 15, 19

Boren-Stewart Co. v. Atchison, T. & S.F.R. Co., 196 I.C.C. 120 (1933)..... 10

Davis v. Portland Seed Co., 264 U.S. 403 (1924) 13, 15, 19, 20

Ex Parte No. 367, *Tariff Integrity Board*, 49 Fed. Reg. 39558 (1979)..... 17

Ex Parte No. MC-370, *Tariff Improvement*, 365 I.C.C. 43 (1981)..... 14

Freightcor Services, Inc. v. Vitro Packaging, Inc., 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 979 (1993).....6, 16

Genstar Chemical Ltd. v. ICC, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1750 (1983) 19, 20

Interstate Commerce Commission v. American Trucking Associations, Inc., 467 U.S. 354, *reh'g. denied*, 468 U.S. 1224 (1984)..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Jasper Wyman & Son et al. – Pet. for Declaratory Order, 8 I.C.C. 2d 246 (1992), *reviewed sub nom. Overland Express, Inc. v. Interstate Commerce Commission*, ___ F.2d ___, 1993 W.L. 213925 (D.C. Cir. June 22, 1993) ..... *passim*

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 111 L.Ed.2d 94, 110 S.Ct. 2759 (1990) 12

Overland Express, Inc. v. Interstate Commerce Commission, ___ F.2d ___, 1993 W.L. 213925 (D.C. Cir. June 22, 1993) 8, 15, 16, 20

Reiter v. Cooper, 507 U.S. ___, 122 L.Ed.2d 604 (1993) 5

Security Services, Inc. v. K Mart Corporation, ___ F.2d ___, 1993 W.L. 210784 (3d Cir. June 18, 1993) 16, 20

Southern Motor Carriers Rate Conference v. United States, 676 F.2d 1374 (11th Cir. 1982) ... 15, 17, 18, 19

STATUTES

28 U.S.C. sec. 1254(1) 2

28 U.S.C. sec. 2101(c) 2

49 U.S.C. sec. 6(3) 19

49 U.S.C. sec. 10101 ..... 6, 8

49 U.S.C. sec. 10321(a) 11

49 U.S.C. sec. 10704 5

49 U.S.C. sec. 10704(b) 9

49 U.S.C. sec. 10708 9

TABLE OF AUTHORITIES – Continued

Page

49 U.S.C. sec. 10708(b) 5
49 U.S.C. sec. 10761 2
49 U.S.C. sec. 10761(a) 4, 5
49 U.S.C. sec. 10762 ..... 2, 11, 12, 13, 18, 19
49 U.S.C. sec. 10762(a) 3
49 U.S.C. sec. 10762(b) 8
49 U.S.C. sec. 10762(c)(3) 4
49 U.S.C. sec. 10762(e) ..... *passim*
49 U.S.C. sec. 11705(b)(3) 5, 6
49 U.S.C. sec. 11706(b) 5
49 U.S.C. sec. 11706(c)(2) 5, 6

REGULATIONS

49 C.F.R. sec. 1312 7
49 C.F.R. sec. 1312.4 13
49 C.F.R. sec. 1312.4(d) 3, 6, 7, 8, 11, 17, 18
49 C.F.R. sec. 1312.7(f)(1) 14

No. _____

In The

Supreme Court of the United States

October Term, 1992

F.P. CORPORATION,

Petitioner,

v.

TWIN MODAL, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDICES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 989 F.2d 285 and reprinted at Appendix B. The order and decision of the United States District Court for the District of Minnesota (Rosenbaum, J.) granting summary judgment for Respondent, is unreported and is reprinted as Appendix A.

JURISDICTIONAL BASIS

The judgment of the United States Court of Appeals for the Eighth Circuit was dated, filed and entered on March 26, 1993. This court has jurisdiction under 28 U.S.C. sec. 1254(1). The petition herein was timely filed pursuant to 28 U.S.C. sec. 2101(c).

STATUTES INVOLVED

49 U.S.C. sec. 10761. Transportation prohibited without tariff.

> Except as otherwise provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff.

49 U.S.C. sec. 10762. General tariff requirements.

* * *

> (e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

STATEMENT OF THE CASE

F.P. Corp. ("F.P.") is a motor common carrier operating pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission ("ICC"). F.P. operated under Title 49 of the United States Code which governs transportation in interstate commerce.

Pursuant to 49 U.S.C. sec. 10762(a) F.P. published a tariff containing rates, *inter alia*, in cents per mile and filed it with the ICC in 1986. The filed tariff specified that a distance guide published by a third party and filed with the ICC was to be utilized for a determination of distances. F.P. failed to follow ICC regulations set forth at 49 C.F.R. sec. 1312.4(d) requiring it to provide the publisher of the distance guide with a power of attorney. F.P. brought a civil action against Twin Modal, Inc. ("Twin Modal") to collect freight charges based upon this filed tariff.

On May 12, 1992, the United States District Court for the District of Minnesota entered summary judgment in favor of Twin Modal and against F.P. On March 26, 1993 the court of appeals affirmed the district court finding the tariff void by virtue of the failure by F.P. to follow ICC regulations requiring F.P. to provide a power of attorney to the publisher of a distance guide which F.P.'s filed tariff incorporated by reference.

I. REASONS FOR GRANTING THE WRIT.

A. The Opinion Below Is Inconsistent With This Court's Previous Opinions Interpreting The Tariff Rejection Provisions Of The Interstate Commerce Act.

One of the many requirements of the Interstate Commerce Act is that motor common carriers subject to ICC authority may provide regulated services only pursuant to tariffs filed with the Commission. 49 U.S.C. sec. 10761(a). Common carriers are specifically forbidden to provide such services in the absence of tariffs and "may not charge or receive a different compensation" than the rate specified in the tariff. 49 U.S.C. sec. 10761(a). By requiring filed tariffs and strict compliance with them, the Act seeks to avoid unjust discrimination and to give shippers an advance opportunity to challenge proposed rates. To achieve this protection, the Act provides explicit procedures, remedies and penalties.

Chronologically, the first step in fixing a new rate, or changing an existing one occurs when the motor common carrier files with the Commission a new tariff, which may not take effect until a specific advance notice period has elapsed. 49 U.S.C. sec. 10762(c)(3). A subdivision of the same section that governs tariff filings provides that the Commission may reject such a "submitted" tariff if the tariff "violates this section or a regulation of the Commission carrying out this section." 49 U.S.C. sec. 10762(e). If the Commission accepts the tariff for filing, the next step under the statutory plan allows the Commission to suspend the effectiveness of the new tariff – before it becomes effective – for a period of seven months after the

tariff would otherwise go into effect and to commence an investigation into its lawfulness. 49 U.S.C sec. 10708(b).

If the Commission pursued this course of action, it can also require the carrier to "keep account" of the revenues collected and to make refunds if the tariffs are ultimately found unlawful. **The suspension period is limited, however, to a specified time period after which the tariffs go into effect if the Commission has not completed its inquiry.** At the end of the investigation, the Commission can also prescribe new rates for the future if the filed tariff is found to be unlawful. 49 U.S.C. sec. 10704.

If the tariff goes into effect, the shipper may, at any time, file a court complaint for overcharges, i.e. payment of charges in excess of the filed tariff pursuant to section 11706(b). Alternatively, the shipper can sue for damages under 49 U.S.C. sec. 11705(b)(3) and 49 U.S.C. sec. 11706(c)(2) if the carrier has collected the published tariff rate but that rate is unlawful under the substantive standards of the Act (e.g., because it is unreasonably high). *Reiter v. Cooper,* 507 U.S. ___, 122 L.Ed.2d 604 (1993)

The opinion below is patently inconsistent with the foregoing statutory plan because it fails to give legal effect to a filed tariff as required by 49 U.S.C. sec. 10761(a). The carrier's filed tariff was never rejected by the Commission upon filing as pursuant to sec. 10762(e). The Commission never suspended Petitioner's tariff pursuant to 49 U.S.C. sec. 10708(b). Respondent has never commenced an ICC proceeding to determine the rate to be applied in the future pursuant to 49 U.S.C. sec. 10704;

nor has Respondent commenced a civil action for damages incurred by Petitioner's referenced to the distance in its filed tariffs, pursuant to 49 U.S.C. secs. 11705(b)(3) and 11706(c)(2).

The opinion below collaterally reviews and gives legal effect to 49 C.F.R. sec. 1312.4(d) which declares a filed tariff "void as a matter of law" where that filed tariff refers to another filed tariff the publisher of which has not been furnished a power of attorney by the carrier. In essence the court below found that F.P.'s *filed* tariff containing *filed* rates stated in cents per mile which *filed* tariff lists another *filed* tariff for more computation of distances is retroactively void. This Court has held that the Commission has no general power to retroactively reject a *filed* tariff. *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354, (1984). Tariffs may be retroactively voided only where the Act provides a specific statutory mandate to the ICC and the retroactive voiding is closely tied to that mandate. *Id.* at 367.

The court below relied upon its companion decision in *Atlantis Express, Inc. v. Associated Wholesale Grocers*, 989 F.2d 281 (8th Cir. 1993). Atlantis in turn contends it is supported by the Fifth Circuit decision in *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 979 (1993).

The "specific" statutory mandate to the ICC which the court in *Vitro* relied upon to retroactively void Petitioner's filed tariff is the National Transportation Policy as codified at 49 U.S.C. sec. 10101. However, the National Transportation Policy provides no mandate to the ICC.

In *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354, *reh'g. denied*, 468 U.S. 1224 (1984), in an unanimous decision, it was held that 49 U.S.C. sec. 10762(e) (which authorizes the ICC to reject motor carrier tariffs if they violate statutory or regulatory requirements, such, for example, as 49 C.F.R. sec. 1312 concerning publishing and filing tariffs) does not confer upon the ICC the broad power to nullify filed tariffs *retroactively*. When faced with the clear holding of this case, it is difficult to imagine how the ICC continues to maintain, as it recently did in *Jasper Wyman & Son, et al. – Petition for Declaratory Order*, 8 I.C.C. 2d 246 (1990) *reviewed sub nom. Overland Express, Inc. v. Interstate Commerce Commission*, ___ F.2d ___, 1993 WL 213925 (D.C. Cir. June 22, 1993), that the retroactive voiding provision of 49 C.F.R. sec. 1312.4(d) is valid and permits it to ignore filed tariffs.[1] Although this Court in *American, supra*, in a 5-4 vote,[2] decided that the ICC had requisite authority to reject effective tariffs submitted in substantial violation of a rate-bureau agreement, limitation of this authority was confined only to those situations involving "a specific statutory mandate of the Commission . . . [upon which] the exercise [its] of power must be directly and closely tied to. . . . " *Id.*, at 367.

---

[1] The *Jasper Wyman* decision is on appeal to the U.S. Court of Appeals for the District of Columbia Circuit in No. 92-1037, *sub. nom. Overland Express, Inc. vs. Interstate Commerce Commission.*

[2] In Part A of the opinion, the Court *unanimously* found that the ICC did not have retroactive authority based upon 49 U.S.C. sec. 10762(e) to nullify effective tariffs if they violated the ICC's tariff publishing regulations.

Both the ICC in *Jasper Wyman*[3] and the Eighth Circuit in the case at bar have failed to identify any statutory mandate allowing them to treat as void a tariff which was indisputably on file. Plainly, 49 C.F.R. sec. 1312.4(d) was promulgated pursuant to 49 U.S.C. sec. 10762(b). Yet, 49 U.S.C. sec. 10762(b) is devoid of any provision governing a carrier's failure to comply with the formal manner of publishing tariffs required by that section. Instead, Congress established 49 U.S.C. sec. 10762(e) to govern rejection of tariffs, wherein it is succinctly stated that: "The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section." Thus, it is evident from the clear reading of the statute Congress intended that *any* regulation concerning the rejection of tariffs promulgated pursuant to 49 U.S.C. Section 10762(b) was to be governed by 49 U.S.C. sec. 10762(e). Moreover, in *American* this court found that rejection power could not be used retroactively:

> [T]he language of subsection 10762(e) and the structure of the Commission's remedial authority under the Interstate Commerce Act (ICA) as amended, 49 U.S.C. Section 10101 et seq. persuade us that Congress could not have meant subsection 10762(e) to confer on the Commission a broad power to nullify effective tariffs retroactively.

Id., at 361-62.

---

[3] Jasper Wyman, the lynchpin for the decision below, was reviewed and overturned by the court in *Overland Express, Inc. v. Interstate Commerce Commission*, ___ F.2d ___, 1993 W.L. 213925 (D.C. Cir. June 22, 1993), one day before this Petition was submitted.

The ICC stated in *Jasper Wyman* that it did not retroactively reject the carrier's tariff as void. 8 I.C.C. 2d 258. Rather, it claims the filed tariffs are not effective. This Court has, however, determined that where as here the Commission had already accepted the tariff as filed, to interpret the ICC's power to *reject* a tariff as also including a license to *revoke* it, "would be contrary to the plain language of the subsection." *American*, 467 U.S. at 362. Moreover, this Court found that allowing retroactive rejection of filed tariffs under sec. 10762(e) would impermissibly afford the Commission far greater authority than is provided under 49 U.S.C. sec. 10704(b), relating to the Commission's authority to cancel effective tariffs and prescribe new rates for the future based upon a reparations finding.

In *American* it was also noted that since the Commission's power to suspend and investigate rate filings is limited to seven months after the proposed tariff's effective date and final action must be taken only after a full hearing (See 49 U.S.C. sec. 10708), to read 49 U.S.C. sec. 10762(e) as allowing retroactive rejection of effective rates would render the constraints of 49 U.S.C. sec. 10708 "nugatory." 467 U.S. at 363. Here the Commission has not explicitly rejected F.P.'s tariff for failure to provide the publisher of the filed distance guide with a power of attorney before they became effective; for doing so would have clearly run afoul of this Court's holding in *American*. Significantly, in order to distinguish *American*, the ICC found in *Jasper Wyman* and the court below found in *Associated Wholesale* that the carrier's distance rates were never "effective". However, in *American* it was stated clearly that "effective tariffs" means tariffs that are filed

with the agency and have "gone into effect." *Id.*, at 360. The definition of "effective tariffs" is further clarified in footnote 4 of the *American* decision, wherein it is stated:

> Prior to 1979, the Commission had no need to reject *effective tariffs*, because the Commission's staff examined every filing prior to the *effective date* of the proposed tariff and if an obvious defect was discovered the tariff was rejected immediately. . . . Since then, the Commission has reviewed only a random sampling of tariff filings, and tariffs with obvious defects inevitably are *permitted to go into effect*. (Emphasis added).

Id. The Commission itself, prior to the *American* decision, had always held that a tariff which was submitted in a technically defective manner was "not a nullity" and the shipper's recovery was limited to actual damages. *See Boren-Stewart Co. v. Atchison, T. & S.F.R. Co.*, 196 I.C.C. 120 (1933); *Acme Pet Products, Ltd. v. Akron, C. & Y.R. Co.*, 277 I.C.C. 641 (1950). This Court in *American*, at footnote 7, not only cited these two cases with approval, but even adopted the statement from *Acme Pet Products* that "where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender." 467 U.S. at 364.

The Commission definition of an "effective" tariff in *Jasper Wyman* is consistent with the definition adopted by this Court in *American*, and the previous ICC decisions cited therein. In *Jasper Wyman* the Commission stated:

> These tariffs, although not complying with all of the tariff regulations *could be considered on file*

> because they had met the threshold requirement (i.e., they had been sent to the Commission and had not been rejected at the outset). [Emphasis supplied].

Id. at 259. Here, F.P. met the same standard: the F.P. distance rate tariff, including its provision incorporating the filed distance guide by reference, was on file with the Commission and had not been rejected at the outset. Thus it was effective under the Commission's own standard enunciated and ignored in *Jasper Wyman*. It is clear from *American* that the filed tariffs of F.P. are not to be disregarded or voided merely because of an irregularity in tariff filing requirements.

While it is clear that the ICC has no power pursuant to 49 U.S.C. sec. 10762 to retroactively reject effective rates, neither can Twin Modal find solace in Part B of the *American* opinion allowing for rejection under the Commission's so-called "discretionary powers." These discretionary powers, however, derive from 49 U.S.C. sec. 10321(a) and are limited in application only when necessary to achieve other specific statutory goals. *Id.*, at 367. In *American* the other specific statutory purpose was to insure compliance with rate-bureau agreements (governed by a separate statutory provision that provided exemption from the antitrust laws). Here there is no provision of the Act relevant or even evident other than 49 U.S.C. sec. 10762, which deals with the Commission's general authority to prescribe rules and regulations concerning the filing of tariffs. Pursuant to *American* the Commission has no power or authority to retroactively enforce 49 C.F.R. sec. 1312.4(d), either in conjunction with, or as an adjunct to, 49 U.S.C. sec. 10762(e) through

rejecting F.P.'s filed tariff. In *Jasper Wyman* the Commission stated that the tariffs under attack in *American, supra,* could not be treated as void because they were filed (i.e. they had been sent to the Commission and had not been rejected at the outset). So here, F.P.'s tariff had been sent to the Commission and not rejected at the outset. Thus under *American* it cannot be treated as void.

The Court of Appeals found no specific statutory mandate authorizing the ICC to retroactively reject a filed tariff. Indeed the ICC attempt to to void application of filed tariffs in its *Negotiated Rates I* policy statement was rightfully rejected by this Court in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

Plainly 49 U.S.C. sec. 10762 cannot be used as a statutory mandate to retrospectively void F.P.'s filed tariff. This is so because Congress established 49 U.S.C. sec. 10762(e) to govern *all* rejections of tariffs established under rules promulgated pursuant to sec. 10762. The language of sec. 10762(e) states:

> The Commission may reject a tariff submitted by a common carrier under *this* section if that carrier violates *this* section or regulation of the Commission carrying out *this* section. [Emphasis supplied].

Thus Congress clearly intended *any* regulation concerning the rejection of tariffs promulgated pursuant to sec. 10762 to be governed by subdivision (e) thereof. Thus, the court below erred by failing to find the specific statutory mandate other than sec. 10762 as required by this Court's decision in *American*.

This Court in *American* specifically found that sec. 10762(e) alone could not be used to retroactively void a filed tariff. Instead sec. 10762(e) is limited to rejections of tariff upon filing. Retroactive rejection of filed tariffs was allowed by this Court only when some other statutory mandate beside sec. 10762 existed. With respect to the second prong of *American*, that the retroactive rejection power be closely tied to the specific statutory mandate, the statute's paramount purpose is to provide open rates, known to all. The net effect of the retroactive rejection is to enable the carrier and shipper to enter into secret rate agreements thus instead actually frustrating the Act's paramount purpose. Indeed a motor common carrier and a shipper could secretly scheme to render a tariff void in order to provide a preference to the shipper by failing to provide the publisher of a referred to tariff with the power of attorney required by 49 C.F.R. sec. 1312.4.

Even assuming arguendo that F.P. did not comply with the ICC regulations governing the use of distance rates, and thus the ICC could properly void reference to the mileage guide tariff, it is clear from *American* that the filed tariffs of F.P. is not to be disregarded or voided merely because of an irregularity in tariff filing requirements. *See also, Davis v. Portland Seed Co.*, 264 U.S. 403 (1924); *Berwind-White Coal Mining Co. v. Chicago and E. R.R.*, 235 U.S. 371 (1914).

In *Davis*, this Court held that the illegality of the filed tariff did not void its application. "The statute requires rigid observation of the tariff without regard to the inherent lawfulness of the rates specified. . . . " *Id.*, 264 U.S. at 404. Likewise, here the Act requires adherence to F.P.'s filed distance rate tariff despite the failure to provide the

publisher of the distance book referred to in F.P.'s tariff with a power of attorney.

In *Berwind* as here, the shipper challenged the carrier's collection of charges based upon the "filed" documents because they did not comply with ICC regulations. The Supreme Court held:

> But the contention [non-compliance with tariff regulations] is without merit. The documents were received and placed on file by the Commission without any objection whatever as to their form and it is certain that, as a matter of fact, they were adequate to give notice.

Id., 235 U.S. at 375.

Similarly, here mileage rates, published in a tariff referring to another tariff as a governing publication for calculation of mileages, were placed on file at the ICC without any objection being made for more than six years after filing. Certainly, as documents on file with the ICC they are adequate to give notice of the applicable mileages. Even if F.P.'s reference to another tariff is void, at worst the term "miles" becomes ambiguous and the shipper would be entitled to any reasonable determination of mileage.

In Ex Parte No. MC-370, *Tariff Improvement*, 365 I.C.C. 43 (1981), the ICC published a rule (49 C.F.R. Section 1312.7(f)(1)) stating that whenever a carrier files a tariff increasing rates without symbolizing the increase as required by ICC regulations, the tariff is unlawful and, unenforceable. This rule was set aside by this Court in *Aberdeen and Rockfish R.R. Co. v. United States*, 682 F.2d 1092 (5th Cir. 1982), *cert. granted, judgment vacated and*

remanded for findings in light of Interstate Commerce Commission v. American Trucking Association, Inc., 467 U.S. 1237 (1984). Thus, Twin Modal's contention in this case that the carrier's distance rates cannot be used because the ICC tariff publication rules were not fully complied with is flatly refuted by this Court's decisions in *American, Rockfish, Berwind* and *Davis*.

B. THE COURTS OF APPEALS ARE IRRECONCILABLY SPLIT ON WHAT CONSTITUTES AN EFFECTIVE TARIFF.

In *Associated Wholesale Grocers, supra,* which serves as the basis of the decision below, the Eight Circuit Court of Appeals held that, although the carrier's tariff was on file with the Commission, it was ineffective due to violations of the Commission's tariff publishing rules. When contrasted against the recent holding of the District of Columbia Circuit in *Overland Express, supra,* and the holding of the Eleventh Circuit Court of Appeals in *Southern Motor Carriers Rate Conference, Inc. v. United States,* 676 F.2d 1374 (11th Cir. 1982), it is clear that the Courts of Appeals are irreconcilably split on the question of whether a filed tariff, not rejected at the outset, is a valid, i.e. effective, tariff.

In *Overland Express,* the District of Columbia Circuit Court of Appeals reviewed and set aside the ICC's decision in *Jasper Wyman, supra,* pursuant to the Hobbs Act. 28 U.S.C. secs. 2321 and 2342. In *Overland Express* the court found that the ICC's power to retroactively void an effective tariff under its discretionary powers did not permit it to void the carrier's tariff merely because the

carrier failed to provide a power of attorney to the publisher of the distance guide, stating:

> We rather doubt that [49 U.S.C.] sec. 10762(a)(1)'s permissive authorization for the Commission to require carriers to include other unspecified information is the type of "specific statutory mandate" the court had in mind in *American Trucking*. And the Commission does not seem authorized to reject tariffs retroactively to satisfy a *regulatory* policy not driven by a specific statutory mandate.

Thus the decision in *Overland Express*, which directly reviewed the ICC decision in *Jasper Wyman*, stands in stark contrast to the holdings in *Freightcor Services, Inc. v. Vitro Packaging*, 969 F.2d 1563 (5th Cir. 1992) and *Security Services, Inc. v. K Mart Corporation*, ___ F.2d ___, 1993 W.L. 210784 (3d Cir. 1993) wherein the courts found 49 U.S.C. sec. 10762(a)(1) was a "specific statutory mandate" allowing the ICC to retroactively reject an effective tariff.

Unlike the Eighth Circuit decision in *Associated Wholesale, supra*, upon which the decision below is based, the decision in *Overland Express* specifically found tariffs effective, notwithstanding a claimed violation of tariff publishing regulation. The decision below finds a tariff to be invalid notwithstanding that it is on file with the Commission if it violates ICC tariff publishing regulations. Even the Third Circuit, which in *K Mart Corporation, supra*, found that the ICC had authority to declare a tariff void, disagreed with the Eighth Circuit over whether a filed tariff was effective nonetheless even though it violated ICC regulations.

In *Southern Motor Carriers* the Court of Appeals reviewed the ICC decision in Ex Parte No. 367, *Tariff Integrity Board,* 49 Fed. Reg. 39558 (1979). In Ex Parte No. 367 the Commission proposed regulations whereby the Commission would, without hearing, strike certain filed tariffs due to violations of Commission tariff publication regulations. The reason for this procedure was set forth as follows:

> The Tariff Integrity Board is being created to allow tariff users (shippers, receivers and carriers) an expedited procedure under which they may complain of potentially unlawfully established tariff matter not detected under the sampling procedures. With the number of filings we receive *it is inevitable that a certain amount of unlawfully established publications will become effective.* [emphasis supplied]

With respect to the effect to be given to stricken tariffs the Commission in Ex Parte No. 367 stated "stricken material will be considered as never having been lawfully established and therefore invalid". Significantly, Ex Parte No. 367 was designed, not to rectify any unlawful rates, but rather to address publication errors and tariff publishing mechanics.

The procedure set forth in Ex Parte No. 367 is akin to the procedure set forth by the Commission in 49 C.F.R. sec. 1312.4(d):

> *Ex Parte No. 367* states in pertinent part:
>
> Stricken material will be considered as never having been filed.

49 C.F.R. 1312.4(d) states in pertinent part:

> Absent effective concurrences as powers of attorney, tariffs are void as a matter of law.

The Commission decision in Ex Parte No. 367 was reviewed and set aside by the Eleventh Circuit in *Southern Motor Carriers, supra.* In reviewing the Commission decision in Ex Parte No. 367 the court framed the issue in nearly identical fashion as this court did in *American, supra,*

> Whether sec. 10762(e) of the Interstate Commerce Act authorizes the Commission to reject or strike an effective tariff. . . .

676 F.2d at 1375.

The result in *Southern Motor Carriers* was the same as the result reached by this court in *American, supra,* to wit: The Commission cannot reject an effective tariff.

The court below circumvented *American* by holding that a filed tariff is not an effective tariff if it violates ICC regulations. This however, places the Eighth Circuit holding below in stark contrast to the Eleventh Circuit which held:

> The Commissioner's position that it may reject effective tariffs for violations of sec. 10762 is inconsistent with its prior decisions. In a long line of cases where shippers brought formal complaints of overcharge on the grounds that the current tariff had been improperly established, the Commission held that applicability of tariffs *does not* depend upon strict compliance which the Commission's publication rules. *A tariff not rejected by the Commission is a valid tariff.* [emphasis supplied]

Southern Motor Carriers, 676 F.2d at 1379. Thus, while the Eighth Circuit held below that a filed tariff is not invalid if it violates ICC publication regulations, the Eleventh Circuit holds that a tariff not rejected by the ICC is valid.

In *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1750 (1983), the continued vitality of *Davis, supra*, and *Berwind, supra*, was acknowledged. In *Genstar*, a shipper argued that the collection of tariff rates should be precluded because of an alleged unlawfulness in the carrier's tariff which, although filed, did not comply with ICC regulations. *Id.*, at 1308. The shipper had asserted its right to the full refund of an illegal rate increase, "not from the establishment of unlawful rates but from the unlawful publication of tariffs." *Id.* The shipper further maintained that unlawfully published tariffs could not serve to increase the transportation rate. The shipper objected to the publication because the carrier's increase exceeded previously approved levels and the updated tariffs did not "plainly state the changes proposed to be made in the schedules then in force as required by 49 U.S.C. sec. 6(3) (now revised as 49 U.S.C. sec. 10762)." *Id.* at 1308. The shipper also objected to the tariffs because they failed to "contain the appropriate symbols (required by agency regulation) or in any other way indicate the nature of the rate change." *Id.* at 1308. After reviewing these claims of tariff non-compliance the Court of Appeals for the D.C. Circuit held:

> The Supreme Court long ago rejected the view that a tariff on file with the Commission and never rejected by it should be disregarded or treated as nonexistent merely because of some

> element of substantive unlawfulness in the rate. [citation to *Davis* omitted], or some irregularity in the tariff filing formalities [citation to *Berwind* omitted]. The principle in these cases is that where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness of irregularity.

Id. at 1308.[4]

Plainly the decision below, as well as the decision in *Associated Wholesale Grocers, supra,* the Third Circuit decision in *K Mart, supra,* and the Fifth Circuit decision in *Vitro, supra,* cannot be reconciled with the decisions of the Eleventh Circuit in *Southern Motor Carriers* and the District of Columbia Circuit in *Overland Express, supra,* and *Genstar, supra.* Filed tariffs which violate ICC regulations are either valid tariffs or not valid tariffs. This court should grant certiorari to resolve this clear conflict among the Circuit Courts of Appeals.

---

[4] Note that the remedy mandated by the ICC in *Jasper Wyman,* a voiding of the tariff, may require re-audit and application of a higher rated tariff, resulting in still higher charges to the shipper, contrary to the remedy indicated by the *Genstar* Court! This would occur, for example, where a distance commodity rate is void and a higher class would become applicable instead.

CONCLUSION

For the foregoing reasons, the Petition of F.P. Corp. should be granted and a Writ of Certiorari issued to the United States Court of Appeals for the Eighth Circuit.

Dated: June 23, 1993.

Respectfully submitted,

PAUL O. TAYLOR
HARRIS AND TAYLOR
Counsel of Record
2950 Metro Drive, Suite 301
Bloomington, MN 55425
(612) 854-3996

Attorneys for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-91-624

F.P. Corporation	)	
	)	
v.	)	AMENDED ORDER
Twin Modal, Inc.	)	

This matter is before the Court on defendant's motion for summary judgment. A hearing was held April 24, 1992. Based upon the files, records, and proceedings herein, and for the reasons set forth at the hearing, IT IS ORDERED that:

1. Defendant's motion for summary judgment is granted.

2. Defendant's counterclaim is dismissed without prejudice, pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: May 12th, 1992

Nunc Pro Tunc: May 4, 1992

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Civil No. 4-91-624

----------X

F.P. Corp.,

Plaintiff, Summary Judgment Motion April 24, 1992

-v-

Twin Modal, Inc.

Defendant.

----------X

PARTIAL TRANSCRIPT OF PROCEEDINGS

HAD BEFORE THE HONORABLE
JAMES M. ROSENBAUM

Minneapolis, Minnesota

APPEARANCES:

For the Plaintiff — Alan D. Harris

For the Defendant — Ronald H. Usem

COPY

Reported By: Dawn Higby Anderson, RPR-CM

[p. 2] THE COURT: The defendant's motion for summary judgment is granted. The defendants counterclaim is dismissed without prejudice pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Plaintiff, F.P. Corporation, has its principal place of business in Omaha, Nebraska, and is a carrier engaged in

the business of transporting goods in interstate commerce.

Defendant, Twin Modal, Inc., is a Minnesota corporation and is an ICC licensed property broker.

On April 27, 1988, both parties executed a broker-carrier agreement. Pursuant to this agreement, the plaintiff transported 81 shipments of freight on behalf of the defendant between August 18, '88, and July 19, 1990. The parties negotiated a rate for transportation for these shipments, which the defendant has paid in full. Plaintiff now asserts that its common carrier tariff applies to these shipments and brings this action to recover freight under charges pursuant to 41 United States Code Section 10761(a) and the "filed rate doctrine," as elucidated in *Maislin Industries v. Primary Steel,* 110 S.Ct. 2752 at 2768, 1990.

The plaintiff filed a single count complaint on August 15th, 1991, asserting that the defendant owes some $28,000, representing its determination of the difference between the negotiated rate and the higher – higher motor common carrier tariffs which the plaintiff has filed with the ICC.

[p. 3] The defendant raises a large number of affirmative defenses, including; Transportation pursuant to contract carriage authority; broker nonliability for under charges pursuant to 49 United States Code 10744; unreasonable tariff rates pursuant to 49 United States Code 10701; statute of limitations, 49 United States Code 107 – or 11706; invalid tariff rates pursuant to 49 C.F.R. Section 1312.4(d); and 6, failure to comply with, or – I'm sorry –

and finally, failure to comply with 49 C.F.R. Section 1051.1.

The defendant also filed a counterclaim in which they assert the plaintiff is liable for damages under the Uniform Deceptive Trade Practices Act, Minnesota Statute Section 325D.44 and thereafter.

The defendant here seeks summary judgment or in the alternative for an order staying these proceedings and then referring this matter to the ICC, which action on some levels at least is not exactly opposed, by nature of argument, by the plaintiff. The plaintiff does, however, oppose all of these matters, and ultimately – but does concede that the rate reasonableness issue would properly be referred to the ICC.

It is axiomatic, quote, that: The first step in any claim for undercharges is the determination of the applicable filed rate, close quote. *Amoco Fabrics & Fibers v. Pope,* I.C.C. No. 40526, decided February 18, 1992, '92 [p. 4] Westlaw cite of 32854. Accordingly, the Court turns first to defendant's claim that the plaintiffs filed common carrier tariffs are void.

The plaintiff – the parties could not dispute that the issue of whether plaintiff's tariffs are void under 49 C.F.R. section 1312.4(d) is an issue which is appropriate to this Court. The doctrine of primary jurisdiction would require referring to the ICC only if the issue presented has, quote, been placed within the special competence of an administrative body, close quote. The *United States v. Western Pacific Railroad,* 352 U.S. 61 at 64, 1956. The primary reasons for referring, uniformity and statutory and regulatory construction and utilization of the agency's

specialized knowledge, are not presented at this point. See *Atlantic Express v. Standard Transportation* at 955 F.2d 529, 532, Eighth Circuit, 1991. The ICC has extensively considered the issue now before the Court, such that referring on this issue to the ICC is not necessary.

In fact, and of course, in *Jasper Wyman & Sons,* 8 I.C.C.2d 246, 1992, the ICC undertook a comprehensive review of the tariff validity question. The ICC held that the failure to comply with the specific tariff filing requirements set forth at 49 C.F.R. section 1312.1 and thereafter may render a tariff void under 49 C.F.R. section 1312.4(d). And that Supreme Court precedent does not [p. 5] prevent the commission from nullifying a tariff which never became, quote, effective, close quote, under the regulations.

ICC decisions subsequent to *Jasper Wyman* have incidentally followed this analytic. Cite *Petition for A Strike Order Regarding A-Line Ltd's Tariff,* I.C.C. 40662, decided March 10, 1992, reported at WL 1992, 57548; *Amoco Fabrics & Fibers v. Pope,* referred to previously, and *Wonderoast Inc.,* 8 I.C.C.2d 24807, February 5, 1992.

The ICC's regulatory and legal interpretations in *Jasper Wyman* have been followed by another court in this district, cite *Atlantis Express v. Associated Wholesaler Grocers,* Civil 4-90-254, district of Minnesota, March 6th, 1992, by my colleague, Judge Doty. This Court agrees and concurs in Judge Doty's analysis, and defers to and adopts the ICC's interpretation of its own regulations as established in *Jasper Wyman.* See here *Department of Social Service v. United States Department of Education,* 953 F.2d 372 at 375, Eighth Circuit, 1992. In addition, this

Court has made its own *de novo* review of the ICC's legal conclusions in *Jasper Wyman*, and the Court is in accord with that view. And then in accord with *ICC v. American Trucking Association*, the ITA case to which we've referred at 467 U.S. 354, 1984, to the effect that retroactive abrogation of a tariff would exist only if a tariff was [p. 6] effectively – or initially effective under the regulations. Cite *Jasper Wyman* at 258.

The Court now turns to the facts in this case and whether those facts require summary judgment for the defendant under *Jasper Wyman* and *Atlantis Express*. Summary judgment is appropriate when there's no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law, Federal Rules of Civil Procedure, 56(c). Summary judgment may be granted under the familiar standards of *Celotex v. Catrett, Anderson v. Liberty Lobby*, and *Hartnagel v. Norman* at 953 F.2d 394, 395 and 6, Eighth Circuit, 1992.

It is the defendant's position that it is entitled to summary judgment because the filed rates reference the Household Goods Carriers' Bureau Mileage Guide, and that reference is inadequate as a matter of law, to comply with the ICC regulations. The defendant then claims that the plaintiff is not a participant in that guide, as required under ICC regulation, 49 C.F.R. Sections 1312.30(c)(iii), 1312.30(c)(4), 1312.27(e), and 1312.4(d), and ICC's decision in *Jasper Wyman*.

The plaintiff must prove the applicability of the tariff rate before it may seek the undercharge based upon that tariff, again citing *Amoco Fabrics*, slip opinion at page 2. To establish an effective tariff, the plaintiff must file [p. 7]

tariffs which, quote, contain provisions for the determination of distances by referring to a distance guide, close quote. There are internal ellipses in addition to that quote. 49 C.F.R. Section 1312.30(c), and the (iii) here, which I referred to before is a triple i under 49 C.F.R. Section 1312.27(e), quote, Carriers participating in tariffs which refer to and are governed by separate tariffs shall also participate in those governing separate tariffs, close quote. In *Jasper Wyman*, the ICC held that a distance guide is a tariff, at page 251. Consequently, the plaintiff must participate in the HC – HGCB Mileage Guide and not simply reference that guide.

Quoting: A carrier may not participate in a tariff issued in the name of another carrier or agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law. Section 1213.4(d). The defendant has presented the sworn testimony of auditor Bruce Hocum, indicating that the plaintiff is not a participant in that mileage guide. Defendant's Exhibit 11, Hocum Affidavit at 6-7.

In response, the plaintiff does not contend that it has complied with ICC regulation by participating in the mileage guide, through the execution of a concurrence or power of attorney. Nor does plaintiff present any record evidence of [p. 8] such compliance. Instead, they urge this Court to reject *Jasper Wyman* and *Atlantis Express* as contrary to the Supreme Court's decision in *American Trucking*. And previous ICC decisions in *Boren-Stewart Co. v. Atchison Topeka*, 196 I.C.C. 120 at 19 – excuse me – decided in 1933, and *Acme Pet Products, Ltd. v. Akron, C & Y Railroad Company*. I can never remember what the C and Y

are. 277 I.C.C. 641, 1950. As previously stated, this Court has declined to accept that invitation.

The plaintiff, having failed to offer any admissible evidence demonstrating a genuine issue of fact regarding its participation in the Guide, as would be mandated under *Anderson v. Liberty Lobby*, 47 U.S. at 452 and *Hartnagel* at 396, the Court must find that plaintiff's tariffs are void as a matter of law pursuant to 49 C.F.R., 1312.4(d). Accordingly, defendant's motion for summary judgment is granted, and the defendant's remaining affirmative defenses need not then be addressed.

The Court now turns to the defendant's compulsory counterclaim for damages under the Uniform Deceptive Trade Practices Act, Minnesota Statute Section 325D.44 *et seq*. This court has ancillary jurisdiction, or what is now referred and termed by statute supplementary jurisdiction, or supplemental jurisdiction over this counterclaim. See *Baker v. Gold Seal Liquors*, 417 U.S. 467 at 469, n.1, 1974, [p. 9] and 28 United States Code 1367(a). The Court, however, may decline to exercise jurisdiction when it has, quote, dismissed all claims over which it has original jurisdiction, close quote. 28 United States Code 1367(c)(3). Because this Court has dismissed the plaintiff's undercharge claim, which provides the original federal question jurisdiction in this action, the Court will decline the invitation to exercise either leadership or jurisdiction over the defendant's state law counterclaim.

Accordingly, the defendant's counterclaim is dismissed without prejudice pursuant to Rule 12(b) – 12(b)(1), Federal Rules of Civil Procedure. The defendant may pursue that court – or that claim in a state court as it

deems appropriate. And that'll be the order of the Court, counsel.

MR. USEM: Excuse me, Mr. Rosenbaum. One of the primary defenses we raised was a contract carriage issue, and I don't recall hearing anything –

THE COURT: Since you won on the invalidity of the tariff, I decline the invitation to consider other issues.

MR. USEM: Thank you.

THE COURT: The Court is now in recess.

(Recess.)

CERTIFIED BY:_____

Dawn Higby Anderson

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2258

F.P. Corporation, Appellant, v. Twin Modal, Inc., Appellee.	* * * * * * * * *	Appeal from the United States District Court for the District of Minnesota.

Submitted: December 17, 1992

Filed: Filed: March 26, 1993

Before McMILLIAN, BOWMAN, and LOKEN, Circuit Judges.

BOWMAN, Circuit Judge.

F.P. Corporation appeals from the order of the District Court[1] granting summary judgment in favor of Twin Modal, Inc.[2] We affirm.

---

[1] The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota.

[2] The District Court also dismissed without prejudice Twin Modal's state law counterclaim.

F.P. Corporation is a common and contract motor carrier, presently insolvent. In April 1988, Twin Modal, a property broker, contracted with F.P. for future shipments of freight. F.P. performed the agreed services and invoiced Twin Modal at the agreed rate. Twin Modal paid the invoiced charges. In August 1991, F.P. brought suit against Twin Modal seeking to recover alleged undercharges, that is, the difference between the contract rate Twin Modal paid and the higher rate set forth in the tariff F.P. purportedly had filed with the Interstate Commerce Commission (ICC).

We agree with the District Court that F.P.'s tariff never was effectively filed with the ICC and thus F.P. is barred from collecting the alleged undercharges from Twin Modal. *See Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, No. 92-1771 (8th Cir. Mar. 26, 1993).

Twin Modal's alternative ground for affirmance – its claim of exemption from liability for undercharges by reason of a contract carriage relationship between the parties – was not considered by the District Court. The record on the issue has not been fully developed. Further, our conclusion that F.P.'s tariff was not effectively filed makes resolution of the contract carriage issue unnecessary to our decision and we decline to consider the issue. F.P.'s motion to strike certain portions of Twin Modal's argument on this issue, which we have taken with the case, is denied as moot.

F.P.'s suggestion that we remand to the ICC for a determination of rate reasonableness is denied. F.P. did not seek such a remand in the District Court. Instead, in its complaint and in its strategy in that court, F.P. relied

solely on its alleged filed rate. F.P. will not now be heard to claim it is entitled to such a remand. *See Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, No. 92-1771 (8th Cir. Mar. 26, 1993).

The judgment of the District Court is affirmed.

A true copy.

Attest:

CLERK, U. S. DISTRICT COURT OF APPPEALS, EIGHTH CIRCUIT.

Supreme Court, U.S.
FILED
JUL 21 1993
OFFICE OF THE CLERK

(2)

No. 92-2062

In The

Supreme Court of the United States

October Term, 1993

F.P. CORPORATION,

Petitioner,

vs.

TWIN MODAL, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RONALD H. USEM
Counsel of Record
HUFFMAN, USEM, SABOE & CRAWFORD, P.A.
1000 Water Park Place
5101 Olson Memorial Highway
Minneapolis, Minnesota 55422
Phone: 612/545-2720
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

18 pp

QUESTION PRESENTED FOR REVIEW

Whether the Eighth Circuit Court of Appeals properly concluded, based on applicable ICC regulations, that Petitioner had no effective mileage rate on file at the ICC upon which to base its undercharge claims?

LIST OF PARTIES

Petitioner, F.P. Corp (FP), was, during the relevant time herein, operating as a common and a contract carrier licensed by the ICC. Respondent, Twin Modal (TM), at all relevant times was (and still is) an ICC licensed property broker.

TABLE OF CONTENTS

Page

Question Presented i

List of Parties ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Statement of the Case 3

Summary of Arguments 5

REASONS FOR NOT GRANTING THE WRIT 6

I. THE DECISION BELOW IS NOT REPRESENTATIVE OF THE CASES INVOLVING THE ISSUE PRESENTED 6

A. Legal Basis For Decision 6

B. Factual Basis For Decision 7

II. SINCE THE CENTRAL ISSUE INVOLVES THE ICC'S INTERPRETATION OF ITS OWN REGULATION, *OVERLAND* IS THE APPROPRIATE CASE FOR THE SUPREME COURT TO CONSIDER 8

III. RESPONSE TO PETITIONER'S ARGUMENTS .. 9

TABLE OF AUTHORITIES

Page

CASES

Atlantis Express, Inc. v. Associated Wholesale Grocers, 989 F.2d 281 (8th Cir. 1993) 4, 6, 9

Freightcor Services, Inc. v. Vitro Packaging, Inc., 969 F.2d 1563 (5th Cir. 1992), cert. den., 113 S.Ct. 979 (1993) 6, 8, 10, 11

I.C.C. v. American Trucking Ass'n., Inc., 467 U.S. 354, rehearing den. 468 U.S. 1224 (1984) 6, 7, 11

Jasper Wyman & Sons, Petition for Declaratory Order, 8 ICC2d 246 (1992) 8

Maislin Industries U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) 3

Overland Express, Inc. v. I.C.C., 92-1037 (D.C. Cir June 22, 1993) 5, 6, 7, 8, 11

Security Services, Inc., f/k/a RISS International Corp. v. K-Mart, No. 92-1833 (3d Cir. June 13, 1993) 6, 8, 10, 11

STATUTES

49 U.S.C. § 10701 4

49 U.S.C. § 10761 3

49 U.S.C. § 10761(a) 9

49 U.S.C. § 11706 4

REGULATIONS

49 C.F.R. § 1053.1 3

49 C.F.R. § 1312.4(d) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

49 C.F.R. § 1312.10(b) 10

49 C.F.R. § 1312.30 ..... 4, 10

49 C.F.R. § 1312.30(c)(1) 2, 4, 10

49 C.F.R. § 1312.27(e) 2, 4, 10

No. 92-2062

In The

Supreme Court of the United States

October Term, 1993

F.P. CORPORATION,

Petitioner,

vs.

TWIN MODAL, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 989 F.2d 285, and reprinted at Petitioner's Appendix B. The order and decision of the United States District Court for the District of Minnesota (Rosenbaum, J.) granting summary judgment for Respondent, is unreported and is reprinted in Petitioner's Brief as Appendix A.

JURISDICTION

Petitioner's statement of the Jurisdictional basis for this case is accurately set forth in its Petition. This Brief in Opposition to the Petition has been timely filed and served pursuant to Supreme Court Rule 15.

PRINCIPAL REGULATIONS INVOLVED

49 C.F.R. § 1312.30(c)(1)

> "*Determination of distances.* (1) A tariff containing distance rates shall contain provisions for the determination of distances by –
>
> (i) Publishing the distances between all locations covered by the distance rates in the tariff;
>
> (ii) Referring to a map(s) attached to the tariff; or
>
> (iii) Referring to a distance guide(s) . . . "

49 C.F.R. § 1312.27(e)

> "*Participation in governing publications.* Carriers participating in tariffs which refer to, and are governed by, separate tariffs (classifications, exceptions, rules, etc.), shall also participate in those governing separate tariffs, . . . "

49 C.F.R. § 1312.4(d)

> "*Concurrences and powers of attorney.* Concurrences and powers of attorney shall not be filed with the Commission. However, a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of

attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law . . . "

STATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case as set forth on Page 3 of its Petition. Additionally, the following is pertinent to the court's consideration:

This case arose out of a lawsuit commenced by F.P. Corporation (hereafter FP), an ICC Licensed Motor Common Carrier and an ICC Licensed Motor Contract Carrier in August 1991, seeking to collect "undercharges" under the Filed Rate Doctrine contained in 49 U.S.C. § 10761, and *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), from Twin Modal, Inc. (hereafter TM), a licensed ICC property broker, relating to approximately 81 shipments of freight transported by FP between August of 1988 and June of 1990. The suit was filed in United States District Court, District of Minnesota.

Prior to the commencement of business between the parties, a Contract of Carriage was executed by them, which was intended to memorialize their relationship. They conducted their business under the terms of their contract. In response to FP's lawsuit, TM raised the following defenses: The Contract and the contract carriage relationship between the parties constituted a complete bar to Plaintiff's action; Defendant's contract complied with the requirements of 49 C.F.R. § 1053.1; as a result of an audit of FP's freight bills and bills of lading, the "filed rates" FP sought to collect were void under 49 C.F.R.

§ 1312.4(d); the rates sought to be collected by FP were "unreasonable" within the meaning of 49 U.S.C. § 10701; TM, as a property broker, was not a consignee or consignor of the shipments and was, therefore, not liable; the statute of limitations contained in 49 U.S.C. § 11706 barred certain of the claims made by FP; TM also counterclaimed asserting violations of the Uniform Deceptive Trade Practices Act. On Motion for Summary Judgment, the U.S. District Court, Minnesota, ruled, on May 12, 1992, in favor of TM, upholding one of its defenses, namely, that FP had failed to comply with 49 C.F.R. § 1312.4(d). The U.S. District Court did not rule on any of the other defenses raised by TM. The decision of the District Court was affirmed by the Eighth Circuit Court of Appeals on March 26, 1993 (989 F.2d 285 (1993)), based on the application of 49 C.F.R. § 1312.4(d), holding that FP's tariff never was effectively filed with the ICC, even though Twin Modal again argued the contract carriage defense.

It is uncontroverted that FP, as a common carrier, was subject to the following ICC Regulations:

Section 1312.30 of Title 49 C.F.R. provides that when a carrier chooses to publish mileage rates rather than rates stated in cents per 100 lbs., it is given three choices for publishing distances to be applied to mileage rates. Sub-section 1312.30(c)(1) requires either (i) publishing the distances between all points for which mileage rates are published, (ii) attaching a map to the tariff or (iii) referring to a filed distance guide such as the Household Goods Carrier Bureau Mileage Guide. § 1312.27(e) requires carriers that refer to a third party's tariff also *participate* in that tariff. Finally, 49 C.F.R. § 1312.4(d)

requires that participation be evidenced by execution of a concurrence or power of attorney and that failure to do so makes tariffs void as a matter of law.

In the instant case, FP did not "participate" in the Household Goods Carrier Bureau Mileage Guide as required under 49 C.F.R. § 1312.4(d)

SUMMARY OF ARGUMENTS

I. The legal basis for the decision in the Eighth Circuit, as well as its factual background are substantially dissimilar to the Third and Fifth Circuit cases (which reach the same conclusion), and the D.C. Circuit, which reaches the opposite conclusion, making the instant case poorly representative of the cases involving the issue presented.

II. Since the central issue involves the ICC's interpretation of its own regulations, *Overland Express, Inc. v. ICC*, 92-1037 (D.C. Cir. June 22, 1993), is the appropriate case for the Supreme Court to consider.

III. The issues raised by Petitioner are substantially broader than those litigated at the Eighth Circuit and fail to deal with the central issue, i.e., the ICC's interpretation of its own regulations.

REASONS FOR NOT GRANTING THE WRIT

I. THE DECISION BELOW IS NOT REPRESENTATIVE OF THE CASES INVOLVING THE ISSUE PRESENTED.

A. Legal Basis For Decision: The Eighth Circuit in the instant case, as well as in the companion case, that it follows *Atlantis Express, Inc. v. Associated Wholesale Grocers*, 989 F.2d 281 (8th Cir. 1993) (Atlantis) sustained the ICC's application of 49 C.F.R. § 1312.4(d) on the grounds that the carrier's tariff(s) was determined not to be effectively filed because the carrier failed to comply with the power of attorney requirement. Thus, in each case the court held that the carrier had no basis for asserting undercharges and denied its claims. The Eighth Circuit is the only U.S. Circuit Court of Appeals which has rendered its interpretation of the application of 49 C.F.R. § 1312.4(d) in that manner. While similarly finding no basis for the carrier's undercharge claims, *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), cert. den., 113 S.Ct. 979 (1993) (Freightcor), and *Security Services, Inc., f/k/a RISS International Corp. v. K-Mart*, No. 92-1833 (3d Cir. June 13, 1993) (K-Mart), each held that the carrier mileage tariffs were effective but properly voided under 49 C.F.R. § 1312.4(d) pursuant to *I.C.C. v. American Trucking Ass'n., Inc.*, 467 U.S. 354, rehearing den., 468 U.S. 1225 (1984) (ATA). The ultimate conclusions reached in the instant case, *Atlantis, Freightcor* and *K-Mart*, are all consistent, but for different reasons. The recent decision of the D.C Circuit in *Overland Express, Inc. v. I.C.C.*, 92-1037 (D.C. Cir. June 22, 1993) (*Overland*) 1993 Westlaw, 213925 (6/22/93), held that the

ICC's application of 49 C.F.R. § 1312.4(d) constituted a retroactive rejection of an effectively filed tariff that contravened *ATA* and was beyond its remedial authority. *Overland* is directly contrary to the Fifth and Third Circuit cases, but not the Eighth. Thus, granting the Petition for Certiorari based upon the Eighth Circuit decisions would be inappropriate.

B. Factual Basis for Decision: The instant case, *F.P. Corp. v. Twin Modal,* involved a claim by a common and contract carrier, which had ceased conducting business but had not filed bankruptcy, asserting undercharges against Twin Modal, an ICC Licensed Property Broker, who was *not* a shipper. The other cases cited above relating to the application of 49 C.F.R. § 1312.4(d) do not involve such a fact pattern. They involve typical fact patterns where bankrupt carriers (and their trustees) assert undercharge claims against shippers. While there are thousands of undercharge cases pending involving the application of 49 C.F.R. § 1312.4(d), very few of them involve claims by non-bankrupt carriers against ICC property brokers. Granting of the petition herein, regardless of the Court's decision on the merits, would create significant confusion and not achieve the desired harmony of the decisions among the circuits because there is no underlying decision, either by the U.S. Federal District Court in Minnesota, or the U.S. Court of Appeals in the Eighth Circuit relating to Twin Modal's liability as a "shipper". In summary, the instant case is a poor representative of the great number of cases involving the application of 49 C.F.R. § 1312.4(d).

II. SINCE THE CENTRAL ISSUE INVOLVES THE ICC'S INTERPRETATION OF ITS OWN REGULATION, *OVERLAND* IS THE APPROPRIATE CASE FOR THE SUPREME COURT TO CONSIDER.

It is not disputed that *K-Mart* and *Freightcor* are contrary to *Overland* which received the ICC's interpretation and application of 49 C.F.R. § 1312(d), in *Jasper Wyman & Sons*, Petition for Declaratory Order, 8 ICC2d 246 (1992). The ICC is the respondent in the D.C. U.S. Circuit Court of Appeals case. The ICC has publicly announced that it is filing with the D.C. Court a Petition for Rehearing, suggesting rehearing en banc to review *Overland*.

Regardless of the decision on the Petition for Rehearing, the non-prevailing party will undoubtedly file a Petition for Certiorari in order to bring the case before U.S. Supreme Court. That is the case of industry-wide significance which would be appropriate for the Supreme Court to decide, since the ICC is the primary interested party and governmental agency whose decisions are fundamentally at issue. Also, the fact pattern in *Overland*, is more typical of the thousands of other undercharge cases that have been decided (or are pending) based on the ICC's application of 49 C.F.R. § 1312.4(d), where a bankruptcy trustee asserts undercharge claims against a *shipper*. It should be noted that in neither of the Eighth U.S. Circuit cases was the *authority* of the ICC to adopt such a regulation questioned. Thus, until a decision on the Petition for Rehearing in *Overland* is rendered, the grant of the Petition for Certiorari in the instant case would be premature. This Court may find it helpful to independently obtain the views of the U.S. Government and the ICC on this issue before rendering its decision herein.

III. RESPONSE TO PETITIONER'S ARGUMENTS

A. Petitioner's characterization of the Question Presented for Review, and its claim (Petitioner's Brief at p. 5, ¶ 3) that the decision below *(F.P. v. Twin Modal)* was inconsistent with the described statutory plan, " . . . because it fails to give legal effect to a filed tariff, as required by 49 U.S.C. § 10761(a).", *assumes* the answer to the central litigated issue. That issue is, does the application of 49 C.F.R. § 1312.4(d) prevent a tariff from becoming "effectively filed"? The Eighth Circuit Court, in the instant case said,

> " . . . We agree with the District Court, that F.P.'s tariff was never effectively filed with the ICC and, thus, FP is barred from collecting the alleged undercharges from Twin Modal. See *Atlantis Express v. Assoc. Wholesale Grocers*, No. 92-1771 (8th Cir. 3/26/93)."

(Petitioner's Brief at p. 11-A). The Court in *Atlantis* acknowledging deference to the ICC's interpretation of its own regulations (p. 7) similarly held that the Atlantis Express tariff was not effectively filed. In neither of the Eighth Circuit cases did the Court reach the issue of whether the ICC had exceeded its statutory authority. That issue was not raised. (p. 7) Since the Eighth Circuit opinions held that the tariff at issue was "not effectively filed", neither decision examines the criteria for dealing with effectively filed tariffs, as perscribed in *ATA*. The entire statutory plan, as stated by Petitioner in its Brief, deals with the issue of whether the ICC has authority to avoid tariffs *after* they have been effectively filed.

In summary, Section 1.A of Petitioner's Brief introduces issues which are substantially broader in scope than those actually litigated and decided by the Eighth Circuit Court of Appeals. Petitioner seeks to include in the requested review, all issues raised by the decisions in the Eighth, Fifth, Third and D.C. Circuit Courts of Appeals. As indicated above, only the Fifth and Third Circuits decisions, *Freightcor* and *K-Mart may* be contrary to *Overland* depending on the decision for the Petition for Rehearing en banc in the D.C. Court of Appeals.

B. Petitioner failed to discuss, based on the facts of this case, the regulatory framework in which the Eighth Circuit (and the ICC) rendered its decisions. § 1312.30 of Title 49 C.F.R. provides that when a carrier chooses to publish mileage rates, rather than rates stated in cents per hundred pounds, it is provided three choices for publishing distances to be applied to the mileage rates. Subsection 1312.30(c)(1) requires either (i) publishing the distances between all points for which mileage rates are published, or (ii) attaching a map to the tariff, or (iii) referring to a filed distance guide, such as the Household Goods Carrier Bureau Mileage Guide referred to by most common carriers, as FP did in the instant case. 49 C.F.R. § 1312.27(e) requires that carriers who refer to a third party's tariff must also *participate* in that tariff. No claim has been made that the ICC did not have authority to adopt that regulation. Additionally, 49 C.F.R. § 1312.10(b) requires carriers to execute a power of attorney to the publisher of a referred-to tariff in order to accomplish the desired participation. No attack has been made on the ICC's authority to adopt such a regulation. Finally, 49 C.F.R. § 1312.4(d) provides that, " . . . Tariffs are void as a

matter of law . . . " absent effective powers of attorney. Thus, in order to render the rate "effective", the tariff regulations require compliance with two elements, namely, the mileage rate and the distances between desired origins and destinations must be properly met in order to be *effective*. Effectiveness is dependent on *participation* as required by the regulation. Without *participation*, tariff users will not be able to determine the freight charges applicable to their shipments. It should be pointed out that the *only* ICC Regulation which provides that failure to comply with it voids a tariff "as a matter of law" is § 1312.4(d). None of the other applicable regulations so clearly state on their face the consequences of noncompliance.

In both of the Eighth Circuit cases, the complaining carriers did not dispute that they were *not participants* in the Mileage Guide. The HGB Mileage Guide, 100-B, stated, in relevant part,

"NOTE: This Mileage Guide may not be employed by a carrier as a governing publication for the purpose of determining interstate transportation rates based on mileage or distance, unless carrier is shown as a participant in the above-named tariff . . . " Thus, even the essential tariff on which the claimants relied in each of the Eighth Circuit cases clearly stated that without "participation", it could not be used. Thus, Petitioner seeks review of the decision in the instant case which: (1) made no *ATA* analysis; (2) upheld the ICC's interpretation of the effect of 49 C.F.R. § 1312.4(d); (3) was based on facts significantly different from those in *Freightcor*, *K-Mart* and *Overland* and still claims that despite its admitted violation of

the Regulations, as well as the Mileage Guide, that it should be allowed to collect.

CONCLUSION

For the reasons set forth above, the Petition of F.P. Corporation should be denied, and the Writ of Certiorari should not be issued to the U.S. Court of Appeals for the Eighth Circuit.

Respectfully submitted

DATED: July 21, 1993

RONALD H. USEM, #111880
HUFFMAN, USEM, SABOE
& CRAWFORD, P.A.
Attorneys for Respondent
1000 Water Park Place
5101 Olson Memorial Highway
Minneapolis, Minnesota 55422
Phone: 612/545-2720